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SANTA ROSA INDIAN COMMUNITY OF THE SANTA ROSA RANCHERIA dba PALACE BINGO AND PALACE INDIAN GAMING

SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

FAIR POLITICAL PRACTICES COMMISSION, a state agency,

Plaintiff,

v.

SANTA ROSA INDIAN COMMUNITY OF THE SANTA ROSA RANCHERIA dba PALACE BINGO AND PALACE INDIAN GAMING, and DOES I-XX,

Defendant.

Case No.: 02AS04544

Date: March 6, 2003
Time: 9:00 a.m.
Dept.: 54
Judge: Hon. Joe Gray

SPECIALLY APPEARING SANTA ROSA RANCHERIA'S REPLY MEMORANDUM OF POINTS AND AUTHORITY IN SUPPORT OF MOTION TO QUASH SERVICE OF SUMMONS AND FIRST AMENDED COMPLAINT [C.C.P. § 418.10]

Date Action Filed: July 31, 2002
Trial Date: None Set

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INTRODUCTION

Plaintiff, the Fair Political Practices Commission ("FPPC") seeks to enforce state law, the Political Reform Act of 1974 (the "Act"), against a federally recognized sovereign Indian tribe- the Santa Rosa Rancheria Tribe of Tachi Yokut Indians (the "Tribe"). In so doing, the FPPC disregards established principles of federal Indian law barring the application of state law to sovereign Indian tribes. By its Motion to Quash, the Tribe moves for an order finding that the Tribe has not expressly waived sovereign immunity and therefore has not consented to suit in state court.

In opposition to the Tribe's motion, the FPPC makes two central arguments. First, the Tribe is amenable to suit for direct enforcement of the Act because the doctrine of Tribal sovereign immunity is inapplicable to this action. (Plaintiff's MPA in Opp. at pp. 10-18). The FPPC supports this assertion by arguing that tribal sovereign immunity is a limited discretionary doctrine that applies only under limited circumstances. Second, the FPPC asserts that the Political Reform Act is applicable to sovereign Indian tribes due to the important interests of the state in controlling the state election process. (Plaintiff's MPA in Opp. at p. 20-27). The FPPC asserts that the state's interest pursuant to the Tenth Amendment to protect the integrity of the electoral process outweighs any interest the Tribe may have.

In this reply, the Tribe will demonstrate that (1) Tribal sovereign immunity is a mandatory doctrine that is co-extensive with the immunity of all other sovereigns and cannot be disregarded unless the Tribe, or Congress has waived the Tribe's immunity; and (2) a state's Tenth Amendment interests do not render the doctrine of sovereign immunity inapplicable. No case has ever held that a Tribe can be sued without a valid tribal, or congressional waiver of a Tribe's inherent sovereign immunity. No matter how vigorously the FPPC argues otherwise, no matter how many times the FPPC restates the importance of the state's interest, the FPPC cannot change the reality that the Tribe's inherent sovereign immunity controls this case.

ARGUMENT

I. NEITHER CONGRESS NOR THE TRIBE HAS WAIVED IT'S INHERENT IMMUNITY FROM SUIT.

The FPPC asserts that tribal sovereign immunity is a limited discretionary doctrine that applies only in instances of commercial transactions between tribes and private individuals and where there are not alleged implications to a state's reserved Tenth Amendment rights. Outside of these very limited areas, the FPPC argues that the common law origins of tribal sovereign immunity render it inapplicable against a state's claims of jurisdiction over the tribe. The FPPC is wrong on each of these points because sovereign immunity (1) extends beyond commercial transactions; (2) it is a mandatory doctrine that does not involve a balancing of interests; and (3) participation does not equate to waiver.

A. Tribal Sovereign Immunity Is Not Limited To Commercial Transactions Between The Tribe and Private Parties.

The FPPC argues that tribal sovereign immunity does not apply in this instance because tribal sovereign immunity is limited to situations involving commercial transactions between tribes and private parties or where Congress has shown deference to the doctrine and to situations involving areas that implicate tribal interests in self-government. (Plaintiff's MPA in Opp. at p. 1). This is not the law. Tribal sovereign immunity is an expansive doctrine that covers all actions of the Tribe regardless of the context of those actions.

A central aspect of the Tribe's sovereignty is the Tribe's inherent immunity from suit. Under the doctrine of tribal sovereign immunity, a Tribe cannot be sued, in any court, unless either Congress or the Tribe has waived the Tribe's inherent immunity from suit. *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). Waivers of tribal sovereign immunity must be express and unequivocal. *C & L Enterprises, Inc., v. Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001). Waivers will not be implied. *Smith v. Hopland Band of Mission Indians*, 95 Cal.App.4th 1, 7 (2002).

The FPPC does not dispute that Santa Rosa Rancheria Tachi Tribe is a federally recognized Indian tribe. (Plaintiff's MPA at p. 6). It follows that there is no dispute that the Tribe enjoys all aspects of its inherent, pre-constitutional sovereignty not limited by Congress. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). Unless the FPPC can show an express and unequivocal waiver by either the Tribe or Congress the Tribe is immune from suit and this court does not have jurisdiction to enforce the California Political Reform Act against the Tribe.

The FFPC asserts that the Supreme Court's recent explication on the reach of tribal sovereign immunity was stated in *Kiowa* and *Potawatomi*. The FPPC is wrong. In *Kiowa* and *Potawatomi* the Court upheld the long tradition of recognizing tribal sovereign immunity as a sweeping doctrine acting as an absolute bar to the jurisdiction of state courts unless there was a valid waiver of the Tribe's immunity. The Court took this action despite, expressing dissatisfaction with it and despite specific requests from the state to "construe more narrowly, or abandon entirely, the doctrine of tribal sovereign immunity. *Potawatomi,* 498 U.S. at 510. The FPPC has suggested precisely the same approach as did Oklahoma and the Supreme Court squarely rejected that approach in *Potawatomi*. Previous case law, as well as *Kiowa* and *Potawatomi*, all stands for the proposition that tribal sovereign immunity is not a limited doctrine. *See*, e.g. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 783 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Puyallup Tribe v. Dept. of Game of the State of Washington*, 433 U.S. 165, 172-173 (1977). It was precisely this long tradition of judicial precedent recognizing the broad reach of tribal sovereign that forced the Court to admit it was "compelled" to apply the doctrine in *Kiowa* despite its dissatisfaction with the doctrine. *Kiowa*, 523 U.S. at 756-760.

Contrary to FPPC's assertion, no case has ever held that a Tribe's claim to inherent immunity is limited to "only" cases involving commercial transactions between tribes and private individuals or to purely governmental functions. (Plaintiff's MPA at p. 12). *Kiowa*, the case the FPPC relies on for its

claim that tribal sovereign immunity is limited to these discrete areas, actually undermines the FPPC's argument on this point. *Kiowa* specifically states:

> Though respondent asks us to confine [tribal] immunity from suit to transactions on reservations and to governmental activities, our precedents have not drawn these distinctions.

Kiowa, 523 U.S. at 755. Thus, rather than limiting the doctrine of tribal sovereign immunity, *Kiowa* and *Potawatomi*, are actually extremely broad statements regarding the Tribe's immunity from suit. Anything else taken from *Kiowa* or *Potawatomi* is not the holding of the case. The FPPC cannot point to a single case that supports it position that tribal sovereign immunity is limited to only commercial activities or governmental activities.

Furthermore, the Supreme Court, as well as other federal and state courts, have had ample opportunity to consider the implications of tribal sovereign immunity from suit in numerous situations not involving commercial transactions. For example, among the many areas in which courts have extended a Tribes immunity are:

-initiating litigation by filing a complaint that are outside the are purely governmental or commercial activities are enforcement of state conservation laws,[1]

-failure to keep the peace leading to mob violence,[2]

-state subpoena power,[3]

-claims alleging unconstitutional "taking" of property,[4] and

-wrongful death claims against the Tribe.[5]

In each of the instance cited above, and in almost every other instance, whenever the issue of immunity arose court applied the doctrine without regard to the underlying nature, or context of the case precisely as *Kiowa* instructs. *Kiowa*, 523 U.S. at 754-755. In every case courts employed the standard "waiver" analysis typically associated with claims of sovereign immunity. The only case that Defendant's could find that actually discussed tribal sovereign immunity and then limited its application is *Cherokee*

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[1] *Puyallup*, supra 433 U.S. at 173-174.
[2] *Turner v. United States*, 248 U.S. 354, 357 (1918).
[3] *United States v. James*, 980 F.2d 1314, 1319-1320 (9th Cir. 1992).
[4] *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991).

Nation of Oklahoma v. Babbitt, 117 F.3d 1489 (D.C. Cir. 1997). There, the reason the court limited the doctrine in that case was because the Tribe attempted to assert sovereign immunity but had voluntarily relinquished its tribal identity so that it no longer enjoyed sovereignty of any sort, including sovereign immunity from suit. *Id.* at 1503.

However, even if the sovereign immunity doctrine was limited to commercial activities and self government, this logically could not limit the Tribe's immunity from suit here. It is universally recognized that Tribe's are governments. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 56. As a government, every action a Tribe takes is necessarily a governmental action. This applies equally to making the making of campaign contributions as it does to making determinations regarding internal tribal policies. As the Declaration of Mike Sisco, Chairman of the Santa Rosa Rancheria Tribe of Tachi Yokut Indians, indicates every decision regarding the Tribe's campaign contributions was made on an official Tribal basis by vote of the Tribal Council. (Declaration of Chairman Mike Sisco paragraphs 6-9). Similarly all decisions regarding contributions by the Tribe were made in the furtherance of important Tribal interests in self-government and commercial development. Finally, all funds used to make contributions approved by the Tribe were made using Tribal funds. (Id. at ¶ 8). Therefore, as each of these actions is purely governmental even under the FPPC's analysis the doctrine of tribal sovereign immunity is still applicable to this instance.

In additions to the limitations the FPPC claims to find in *Kiowa* and *Potawatomi*, the FPPC also claims that tribal sovereign immunity is a limited common law doctrine based on congressional deference. The implication of FPPC's statement is that this common law origin somehow limits the application of the doctrine. FPPC's arguments in this manner are wrong. Contrary to what the FPPC suggests, the sovereign immunity of all governments, including that of the United States, is based on the common law. *Alden v. Maine,* 527 U.S. 706, 764-798, (1999). No sovereign can point to constitutional

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[5] *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421, 424 (Ariz. 1968).

language creating the privilege of immunity from suit. Therefore, that Tribe's immunity is based on a common law doctrine is irrelevant and has no bearing on the application or extent of that immunity.

The United States Supreme Court has acknowledged as much stating:

> It is a well-established rule that Indian tribes are immune from suit. The sovereign immunity of Indian tribes is similar to the sovereign immunity of the United States; neither can be sued without the consent of Congress.

People of the State of California v. Quechan Tribe of Indians, 595 F.2d 1153, 1155 (9th Cir. 1979). Further, a Tribe's immunity from suit, under the "common law" doctrine of sovereign immunity is "coextensive with that of other sovereigns, including the United States." *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989). Importantly, although tribal sovereign immunity developed out of the common law, the United States Supreme Court has clearly stated that as sovereign governments antedating the federal and state government even the Constitution does not limit a Tribe's immunity against suits brought by a state. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991). Therefore, any argument that as a common law doctrine tribal sovereign immunity is of limited applicability is simply wrong.

B. Tribal Sovereign Immunity Is A Mandatory Doctrine That Does Not Involve A Balancing of Interests.

In its Opposition the FPPC argues that tribal sovereign immunity is a discretionary doctrine analyzed on a case by case basis and involving a balancing of tribal, federal, and state interests. (Plaintiff's MPA Opp. at p. 24). The FPPC cannot overcome the traditional "waiver" analysis associated with tribal sovereign immunity. The FPPC concedes, as it must, that it "does not rely on express waiver as the basis of this Court's jurisdiction." (Plaintiff's MPA in Opp. at p. 18). Instead, the FPPC argues a "pre-emption" analysis to determine whether the exercise of state authority would violate federal law. (*Id.* at p. 10-18). "[S]overeign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation." *Pan American*, 884. F.2d at 419. Tribal

sovereign immunity is a mandatory doctrine that does not allow for the balancing of any interests, no matter how important that interest may be.

The Ninth Circuit court of appeals has held that:

> Sovereign immunity involves a right which Courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy, as suggested by California's argument, the application of which is within the discretion of the Court.

People of the State of California v. Quechan Tribe of Indians. 595 F.2d 1153, 1155 (9th Cir. 1979). The United States Supreme Court explication on this particular subject upholds the Ninth Circuits analysis. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940). Courts recognize, respect, and invoke the Tribe's immunity unless there is a clear, express, and unequivocal waiver thereof.

Much of the FPPC's argument is premised on its claim that its interest in enforcing the Political Reform Act, according to the strict terms of the Act, is so compelling it outweighs the Tribe's inherent immunity from suit. The fundamental flaw in the FPPC's argument on this point is that the FPPC fails to acknowledge the crucial distinction made by the United States Supreme Court between a state's right to regulate a tribe's conduct in the abstract, and the ability of that state to use formal legal action to enforce that right. *Kiowa* 523 U.S. at 755. Courts have applied the "balancing of interests" test to determine whether state substantive law applies to tribal members on the reservation. *White Mountain v. Bracker,* 448 U.S. 136, 145 (1983). Court's have not however, applied that same test to determine whether tribal sovereign immunity bars a state's attempt to enforce that substantive state law in court. *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549, 559 (9th Cir. 2002); *Pan American*, 884. F.2d at 419.

The cases the FPPC cites for this proposition are inapposite. Each case cited by the FPPC involved an assessment of whether the state had the authority to regulate on reservation activity of non-Indians, or individual tribal members. None of the cases involved a determination regarding whether courts should use a similar balance of interests test to determine whether a tribe is immune from suit.

Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450, 458 (1995) (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-217 (1987) (balancing interests affected by State's attempt to regulate on-reservation high-stakes bingo operation)); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976) (balancing interests affected by State's attempt to require tribal sellers to collect cigarette tax on non-Indians).

This balancing, if it is applicable at all, a point the Tribe does not concede, applies only in instances considering whether a state may regulate individuals on the reservation. It does not apply when a state is attempting to regulate a Tribe, and it certainly does not apply to a determination of whether a tribe is immune from suit. *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549, 559 (9th Cir. 2002); *Pan American*, 884 F.2d at 419.

Similarly, the United States Supreme Court has had frequent opportunity in recent years to analyze the issue of tribal immunity from suit. *C & L Enterprises Inc. v. Potawatomi Indian* Tribe, 532 U.S. 411 (2001); *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 532 U.S. 751 (1998); *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 489 U.S. 505 (1991). In each of these cases, even where the Court found that tribal sovereign immunity did not bar the suit against the Tribe, the Court based its decision on traditional "waiver" analysis. Not once, did the Court employ, or even mention the applicability of any type of "balancing of interests."

C. The Tribe's Participation In State Politics Is Not An Express Waiver of Tribal Sovereign Immunity.

The FPPC argues that *Three Affiliated Tribes of the Fort Berthold Reservation v. World Engineering*, 476 U.S. 877 (1986), stands for the proposition that whenever a Tribe willfully participates in an area for which the state has developed an elaborate procedural scheme, the Tribe has submitted to state enforcement. (Plaintiff's MPA in Opp. at p. 18). *Three Affiliated Tribes* involved a situation where the Tribe, *as a plaintiff*, brought suit in state court on a claim of alleged breach of contract. *Three Affiliated Tribes*, 476 U.S. at 878. Contrary to the FPPC assertions, *Three Affiliated Tribes* actually

held that the state cannot condition the Tribe's participation in state court on the Tribe's willingness to waive its inherent sovereign immunity. *Id.* at 890. Similarly, to say here that the Tribe's participation in politics is a waiver would intrude on the overall sovereignty of the Tribe by prescribing the precise terms on which the Tribe's participation in the political process may occur in direct contravention of the rule established in *Three Affiliated Tribes. Id.*

By voluntarily participating in the California political processes and submitting reports to the FCCP, the Tribe has not waived its sovereign immunity as to this action. *Potawatomi*, 498 U.S. at p. 509 (Tribe's filing civil action in state court does not waive immunity from counterclaim based on same subject matter); *Hagen v. Sisseton-Wahpeton Community College*, 205 F. 3d 1040, 1044 (8th Cir. 2000) (Tribal college's participation in federal funding did not waive tribal immunity from terminated employee's discrimination suit); *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1243 (11th Cir. 1999) (Tribe's participation in gaming enterprise did not waive Tribe's immunity from state suite to compel compliance with federal Indian Gaming Regulatory Act). Because tribal sovereign immunity "is dependant on and subordinate to, only the Federal Government, not the States" (*Cabazon, supra* 480 U.S. at 207), a state may not condition a tribe's sovereign immunity on compliance with a state statute that diminishes that sovereign immunity.

Finally, the FPPC's reliance on *Minnesota State Ethical Practices Board v. Red Lake DFL Committee*, 303 N.W. 2d 54 (Minn. 1981). ("*Red Lake*") and *Shakopee Mdewakanton Sioux (Dakota) Community v. Minnesota Campaign Finance and Public Disclosure Board*, 586 N.W.2d 406 (Minn.Ct.App. 1998) ("*Shakopee*") for authority that state court jurisdiction is recognized by other courts inapplicable to the issue of "Tribal" sovereign immunity. (Plaintiff's MPA in Opp. at p. 26). *Red Lake* involved an enforcement action by the state over a political action committee. *Red Lake*, 303 N.W. at 55. *Red Lake* did not involve or discuss, in any manner, the state's jurisdiction over the Tribe itself. The committee in *Red Lake* was not a committee of the Tribe and had no relationship to the tribe other

than the possibility of being comprised of tribal members, and supporting positions presumably favorable to the Tribe. Similarly *Shakopee*, although involving similar underlying state interests and laws, 586 N.W.2d at 410, does not apply to the case at bar. In *Shakopee*, the issue of the Tribe's sovereign immunity from suit never arose because the Tribe itself was the plaintiff. *Shakopee*, 586 N.W.2d at 408. That is not the case here. The Tribe is not a plaintiff. The Tribe has not itself invoked the jurisdiction of the Court. The Tribe not even a willing defendant as the Tribes initial defense is that this Court does not have jurisdiction over the Tribe. Under established case law precedent the FPPC assertion of jurisdiction is unwarranted and Tribe is not amenable to suit.

II. STATE'S TENTH AMENDMENT INTEREST CANNOT OVERCOME THE TRIBE'S INHERENT SOVEREIGN IMMUNITY.

In its opposition, the FPPC continually refers to the state's protected Tenth Amendment rights. (Plaintiff's MPA in Opp. at pp. 2,5,18,24,29). The FPPC quizzically argues the Tenth Amendment coupled with the state's compelling interest in controlling the electoral process somehow renders the doctrine of tribal immunity inapplicable. No case that has dealt with the states rights under the Tenth Amendment has ever held that the Tenth Amendment renders the doctrine of sovereign immunity inapplicable, regardless of how compelling a state's interest may be. As discussed above a Tribe is immune from suit unless either the Tribe or Congress has waived the Tribe's immunity. The Tenth Amendment is not a waiver of the tribe's immunity.

A. The Tribe's Immunity Is Not Waived By Congressional Silence.

The FPPC argues that because no federal statue prohibits state regulation of tribal campaign contributions – it must be allowed to do so. (Plaintiff's MPA in Opp. at p. 15). The FPPC is correct that Congress has not expressly waived the Tribe's immunity in this case. Indeed with respect to the Tribe's immunity from enforcement actions arising out of participation in the state political process, Congress has remained entirely silent.

The FPPC looks to the Federal Election Campaign Act, and the McCain Feingold Bipartisan Campaign Reform Act of 2002, as support for the notion that the state has enforcement powers over the tribe under the California Political Reform Act. (Plaintiff's MPA in Opp. at p. 15). The Federal Election Campaign Act and McCain Feingold Bipartisan Campaign Reform Act is irrelevant to this case. Importantly, both pieces of federal legislation cited by the FPPC are absolutely silent as to the ability of states to regulate a Tribes political activity, as well as the state's ability to enforce state election laws against the Tribe. It is indisputable that Congress has plenary powers in matters dealing with Indian tribes. *United States v. Wheeler*, 435 U.S. 313, 319 (1979). Congress, therefore, can take any action it desires with respect to tribal sovereign immunity. The mere fact that Congress has chosen to include tribes within the framework of federal legislation is nothing more than an allowable exertion of Congressional discretion. This action, however, has no implication as to whether similar state laws are likewise applicable to sovereign Indian tribes.

Contrary, to the FPPC's wishes, Congress' silence with regard to tribal sovereign immunity cannot be construed to be a waiver thereof. *People ex rel. Department of Transportation v. Naegele Outdoor Advertising Co.*, 38 Cal.3d 509, 519 (1990) (recognizing that waivers of immunity must be unequivocally "expressed'). No matter how hard the FPPC tries, the FPPC simply cannot alter the fact that the terms "silence" and "express and unequivocal" are mutually exclusive.

FPPC's reference to the case of *Gregory v. Ashcroft,* 501 U.S. at 460, is inapposite. *Gregory* dealt with direct legislation on the part of Congress that conflicted with state Constitutional provisions. *Gregory* in no way addressed the issue of a state determining who may participate in the electoral process. None of those issues present in *Gregory* are present in this case. Neither the Tribe, nor Congress, is attempting to alter the form and nature of California state government. None of the actions taken by the Tribe have impact on California's ability to determine the requirements or qualifications of state officials or any other aspect of State government. All that the Tribe has done in this instance is to

assert its right to participate in California politics and advocate for its governmental interests. This is not an intrusion on the sovereignty of the State of California and is not of the nature of interests recognized in *Gregory*.

The FPPC cannot point to any congressional or even tribal action that threatens this sovereignty. Congress has passed no laws the in any way limit the state's sovereignty with respect to the state electoral process. However, even if Congress had done so, that action would not give rise to a suit against the Tribe. In that instance the FPPC's, or the state's, recourse would be to bring suit against the federal government, not the Tribe. Nonetheless, Congress has taken no action whatsoever. Nothing that has taken place in this instance impinges on the states ability to determine the form or nature of state government.

B. The Act and The FPPC Actions Pursuant To The Act Will Impact An Area Of Traditional Tribal Authority and Affects Tribal Sovereign Interest.

The FPPC claims that allowing it regulate the Tribe's political contributions and bring enforcement actions against the Tribe will have no implications for tribal sovereignty or tribal self-government. (Plaintiff's MPA in Opp. at p. 10). The FPPC's own theory of the case, however, completely undermines this statement. The only way the FPPC can assert its jurisdiction over the Tribe in this instance and bring a suit for direct enforcement of the Act is if this Court rules that the state's Tenth Amendment interests somehow render the doctrine of tribal sovereign immunity inapplicable. This alone will have severe and deleterious impacts on tribal sovereignty and tribal self-government.

If the Court were to rule that a state's Tenth Amendment rights could somehow overcome a tribe's inherent immunity from suit the effect would be to eliminate the doctrine and render Tribes subject to the enforcement law passed by the California legislature. Whenever a state legislates it is acting under rights reserved to it under the Tenth amendment. Presumably, every state law involves an area of great importance to the state. Thus, if the Court were to hold that a state's Tenth Amendment

rights to exercise the state's police powers to enforce state laws waived a Tribes immunity, Tribes would have no protection from any incursion on the sovereignty of the Tribe by states seeking to enforce state law. In this situation, Tribes would no longer be separate, domestic dependant nations retaining traditional aspects of their sovereignty. Rather, Tribes would be more akin to cities or municipalities. This is clearly contrary to the considerable body of case law dealing with the nature and meaning of tribal status under our system of government.

Furthermore, the exercise of state court jurisdiction over a sovereign Indian tribe without the Tribe's consent thereto, in an of itself, implicates the Tribe's strong interests in "sovereignty and self-governance." *Three Affiliated Tribes,* 476 U.S. at 890. Immunity is a recognition of "sovereignty of Indian tribes and seeks to preserve their autonomy, protects tribes from suits in federal and state courts." *Wichita and Affiliated Tribes of Oklahoma*, 788 F.2d at 771.

The doctrine of tribal sovereign immunity, therefore, relates to the Tribes overall status as a sovereign. Tribes always have an interest, as do all sovereigns, in not being hailed courts of another sovereign against their will. This interest cannot be stated strongly enough. Without sovereign immunity a Tribe would continually be the subject of suits of any nature, rendering it impossible for the Tribe to fully pursue the ultimate goal of sovereignty: self-governance. Courts, as illustrative above put immunity on the highest of platforms in terms of protection of the Tribes as sovereigns.

Here, the Tribe has an enormous interest in self-government. Self government is the very basis of tribal existence. This interests is supported by the court decisions cited above as well as by the "overriding goal" of federal Indian policy which is designed toward "encouraging tribal self-sufficiency and self-development." *California v. Cabazon*, 48 U.S. at 217. If the Tribe did not enjoy sovereign immunity from suit this entire policy could be entirely undermined.

Finally, nothing could be more important to the further development of Tribal governments than the acknowledgement by, and respect of, other similar sovereigns. Thus, tribal government is

strengthened by states showing Tribes the respect they are worthy of and dealing with Tribes on a government-to-government basis. This is precisely the route the Tribe has suggested in this instance. The Tribe's self-governing ability is severely undermined when the state breaches Tribe's inherent sovereign immunity and treats the Tribe as it does any other "person" within the state. As shown above, Tribes are not persons or mere aggregations of persons, Tribe's are sovereign governments that deserve respect as such. Tribal sovereign immunity is a critical component of that status.

III. THE CALIFORNIA POLITICAL REFORM ACT DOES NOT APPLY TO A FEDERALLY RECOGNIZED INDIAN TRIBE.

Even if the Tribe's inherent sovereign immunity from suit did not bar the state's attempt to enforce the Act against the Tribe, the state still has no recourse in this instance because the Act, by its very terms, does not apply to the Tribe. The FPPC argues that "the Act defines 'person' broadly" and "does not detail every possible kind of association, group, or organization coming within the terms of the Act," -"[a]t a minimum, a tribe is a group of persons acting in concert." (Plaintiff's MPA in Opp. at p.8). The FPPC's characterization of the Tribe as a "group of persons acting in concert" is not only inaccurate but offensive to every Indian person. The Tribe is not merely a group of persons acting on concert, but are sovereign nations. "Indian Tribes within 'Indian country' are a good deal more that 'private voluntary organizations.' They 'are unique aggregations possessing attributes of sovereignty over both their members and their territory." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1981), *quoting U.S. v. Mazurie*, 419 U.S. 544, 557 (1975).

The FPPC cites *FPPC v. Suitt*, 90 Cal.App.3d 125, 133 (1979) for its holding that the California Legislature is a "person" under the terms of the Act. The FPPC makes a leaping argument that if the California Legislature is a "person," the Tribe must also be a "person" under the Act.

First, the California Legislature is in no way similar to a sovereign Tribe. The California Legislature is merely a division the California state government. The Legislature, unlike the Tribe, is not a distinct sovereign government. Accordingly, California Legislature, unlike the Tribe, does not

First, the California Legislature is in no way similar to a sovereign Tribe. The California Legislature is merely a division the California state government. The Legislature, unlike the Tribe, is not a distinct sovereign government. Accordingly, California Legislature, unlike the Tribe, does not enjoy any aspect of sovereignty, including a claim to sovereign immunity, of its own accord. Any aspect of sovereignty, or sovereign immunity from suit enjoyed by the Legislature is a derivative of the State's sovereignty. The Tribe on the other hand, as illustrated above, enjoys sovereign immunity in the first instance. The Tribes immunity is pre-constitution and does not derive from anything other that its historic status as a separate and independent nations.

Furthermore as the court in *Suitt* correctly noted the California Legislature is inseparable from its individual members. *FPPC*, 90 Cal.App.3d at 133. Tribes, unlike the California Legislature, are decidedly more than mere voluntary aggregations of individuals. *Merrion v. Jicarilla Apache Tribe,* supra at 557. Thus, while it may be true that the California Legislature, an entity made up of the voluntary association of individuals falls within the purview of the Act, Tribes as governments separate and distinct from its individual members, certainly do not.

Interestingly, the FPPC essentially admits that the Act was not intended to apply to Tribes. (Plaintiff's MPA in Opp. at p.11). Tribes were never even considered at the time the Act was passed in 1974. As stated by the FPPC and James K. Knox, Executive Director of California Common Clause, it has only been the past 5 years or so that Tribes and tribal members have been active in making contributions to the California electoral process. This is entirely consistent with purpose of the McCain Feingold Act's inclusion within the purview of that particular legislation. The federal government obviously recognized the important role that tribe's are becoming considerably more active in the area of federal elections. Therefore, the McCain Feingold Act specifically listed Indian tribes as one of the many entities subject to the Act. The FPPC and the State of California cannot make a similar claim.

The plain language of the Act unambiguously omits any reference to Tribe's or Indian tribal governments. If the Act were truly intended to cover Tribes the State of California should have provided so under the express terms of the Act. It did not and the FPPC can point to no legislative history or other support for the proposition that this Act was intended to apply to the Tribe.

The State cannot correct its past oversight by stretching the terms of the Act beyond what was intended at the time it was passed. *People v. Morris*, 46 Cal.3d 1, 15 (1988). The proper approach in this is for the State to amend the law so as to expressly and clearly include Tribes within the meaning of the term "person." As a result, no matter how hard the FPPC attempts to stretch the meaning of the term "person" as defined by the Act, it cannot fit sovereign Indian tribes within that meaning. Thus, the Court, in this instance is faced with having to interpret the Act as it was written in 1974 - not the Act as the FPPC and the State of California would like to be written in 2003.

However, even if the FPPC could fit the Tribe within the definition of "person," or even if the California Legislature corrected the ambiguity left in 1974 through legislative amendment, the State, as shown above, would still not have the ability to enforce the Act against the Tribe under the doctrine of tribal sovereign immunity.

IV. ANY STATE RIGHT TO REGULATE DOES NOT INCLUDE THE RIGHT TO ENFORCE THE ACT AGAINST THE TRIBE.

Even if this Court were to find that the Act applies to the Tribe, the FPPC still has no recourse in this instance because, as argued above, the doctrine of tribal sovereign immunity precludes the FPPC's ability to bring an enforcement action against the Tribe.

The United States Supreme Court has routinely recognized the distinction between a state's right to regulate the on reservation conduct of non-Indians, and in limited circumstances individual tribal members. In *Puyallup Tribe v. Department of Game of the State of Washington,* 433 U.S. 165 (1977), the Supreme Court held that the State had the authority to regulate the fishing rights of individual members, but the doctrine of tribal sovereign immunity barred the state's attempts to enforce the same

states law against the Tribe. In that case, the State was attempting to enforce state laws against the Tribe that were enforced under the state's police power, reserved to it under the Tenth Amendment, to protect the state's "important natural resources." *Puyallup*, 433 U.S. at 173. With respect to the Tribe's inherent immunity from suit the Court stated:

> [I]n regard to Tribe opposed the state's ability to sue the Tribe directly to enforce state law under the doctrine of tribal sovereign immunity] The attack is well founded. Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." This Court, *United States v. United States Fidelity & Guaranty Co.* supra: the Washington Supreme Court, see, e.g. *State ex rel. Adams v. Superior Court*, 57 Wash.2d 181, 182-185, 356 P.2d 985, 987-988 (1960): and the commentators, see e.g., U.S. Dept of Interior, Federal Indian Law 491-494 (1958) all concur.

Id. at 173. Similarly, in the recent case of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), the Supreme Court expressly recognized the reality when it stated that "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa,* 523 U.S. at 755.

The Court in *Kiowa* came to this conclusion even though the court, in dicta, expressed its displeasure with the doctrine of tribal sovereign immunity, and even though all of the relevant acts in that case took place off the reservation where one would find it logical for state law to apply to the fullest extent possible. *Kiowa,* 433 U.S. at 760. Nevertheless, the Supreme Court in *Kiowa* unequivocally stated that:

> To say substantive state laws apply to off-reservation [tribal] conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In *Potawatomi,* for example we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store, to non-members, the Tribe enjoys immunity from suit to collect unpaid state taxes.

Id. Recently, the Ninth Circuit was presented with an argument similar to that of the FPPC regarding the relationship between authority to regulate and the ability to sue a Tribe. With respect to this issue, the Ninth Circuit stated:

> *Dawavendewa* appears to confuse the fundamental principles of tribal sovereign authority and tribal sovereign immunity. The cases *Dawavendewa* cites address

> only the extent to which a tribe may exercise jurisdiction over those who are non-members, i.e. tribal sovereign authority. These cases do no address the concept at issue here-our authority and the extent of our jurisdiction over Indian tribes, i.e. tribal sovereign immunity.
>
> In the case at hand, the only issue before us is whether the [Navajo] Nation enjoys sovereign immunity from suit. We hold that it does, and accordingly, it cannot be joined nor can tribal officials be joined in its stead.

Dawavendewa v. Salt River Project, etc., 276 F.3d at 1161 (9th Cir. 2002) (emphasis added).

The same reasoning holds true with respect to the leap from state authority to regulate a tribe to the state's ability to bring a direct enforcement action against a Tribe in state, or any court, without the Tribe's consent. Thus the Ninth Circuit has held:

> While the several distinguishing features of this case may make it unique . . . they cannot justify a refusal, by this court, to recognize the Tribe's claim of sovereign immunity. The fact that it is the State which has initiated suit is irrelevant insofar as the Tribe's sovereign immunity is concerned. [cit.om.] Although we may sympathize with California's need to resolve the extent of its regulatory power, the 'desirability for complete settlement of all issues . . . must . . . yield to the principle of immunity.' [cit.om.]
> Sovereign immunity involves a right which courts have no choice, in the absence of a waiver but to recognize. It is not a remedy, as suggested by California's argument, the application of which is within the discretion of the court.

California v. Quechan Tribe of Indians, 595 F.2d 1153, 1155 (9th Cir. 1979). Even if this Court finds that the California Political Reform Act applies to the Tribe, a point which the Tribe does not concede, because, as discussed fully above, the FPPC does not have the means to enforce the Act against the Tribe because the Tribe is immune from suit. No matter how hard the FPPC tries to avoid it, and no matter how hard the FPPC tries to downplay the broad holding of *Kiowa* the law is clear on this issue.

V. THE FPPC'S FEARS OF TRIBAL INTERFERENCE WITH THE STATE ELECTORAL PROCESS IS UNSUBSTANTIATED AND OFFENSIVE.

The FPPC at numerous places throughout its brief implies that that the Tribe has an unscrupulous intention to purposefully disrupt the California electoral process including statements such that the Tribe will "serve as a money laundering haven for law breakers," "corrupt state government with impunity,"

and "serve as a conduit for others who seek secretly to influence stat elections." (Plaintiff's MPA in Opp. at p. 22, 24). This characterization of the Tribe's is offensive and entirely unsupported. The Tribe has evidenced no intention to disrupt any component of the California process. The Tribe has only acted to protect or further its Tribal members interest. (Declaration of Chairman Mike Sisco at paragraph 9). The implication put forth by the FPPC that the Tribe would in any way use it's inherent and sacred tribal sovereign immunity in a nefarious attempt to undermine the California state government is ludicrous. Similarly, any argument that the Tribe would essentially barter its sovereignty to "other's who seek secretly to influence state elections" or to otherwise disrupt or discredit the state electoral process shows a complete lack of knowledge and respect on the part of the FPPC of the sacred nature of tribal sovereign immunity.

CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that its Motion to Quash be granted.

Dated: February 28, 2003

MONTEAU & PEEBLES LLP
CHRISTINA V. KAZHE
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By _____
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SANTA ROSA RANCHERIA TACHI YOKUT TRIBE and THE PALACE INDIAN GAMING CENTER

PROOF OF SERVICE BY MAIL
(CCP 1013a)

I declare that I am employed with the law firm of Monteau & Peebles, L.L.P., whose address is 1001 Second Street, Sacramento, California 95814-3201; I am not a party to the within cause; I am over the age of eighteen years; and I am readily familiar with Monteau & Peebles, L.L.P.'s practice for collection and processing of correspondence for mailing with the United States Postal Service and know that in the ordinary course of Monteau & Peebles, L.L.P.'s business practice the document described below will be deposited with the United States Postal Service on the same date that it is placed at Monteau & Peebles, L.L.P. with postage thereon fully prepaid for collection and mailing

I further declare that on the date hereof I served a copy of:

SPECIALLY APPEARING SANTA ROSA RANCHERIA'S REPLY MEMORANDUM OF POINTS AND AUTHORITY IN SUPPORT OF MOTION TO QUASH SERVICE OF SUMMONS AND FIRST AMENDED COMPLAINT [C.C.P. § 418.10]

on the following by placing true copies thereof enclosed in a sealed envelope addressed as follows for collection and mailing at Monteau & Peebles, L.L.P., 1001 Second Street, Sacramento, California 95814-3201, in accordance with Monteau & Peebles, L.L.P.'s ordinary business practices:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at Sacramento, California, this 28th day of February, 2003.

Vonda Ricciardi